In The

Supreme Court of The United States

October Term, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,
Appellees.

MOTION OF APPELLEE WISCONSIN EMPLOYMENT RELATIONS BOARD TO DISMISS APPEAL

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THE GILLIAN PRESS, MADISON, WISCONSIN

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AUTHORITIES CITED

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Appellee Wisconsin Employment Relations Board, pursuant to Rule 16 of the Revised Rules of this court, respectfully moves to dismiss the appeal in the above entitled case on the ground that it does not present a substantial federal question.

I.

THE ACTION OF THE STATE COURT OF WHICH REVIEW IS SOUGHT IS THE SAME AS THAT AFFIRMED BY THIS COURT IN ALLEN-BRADLEY LOCAL 1111 v. WISCONSIN E. R. BOARD, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154

The nature of the action of which review is sought is succinctly described in the following excerpt from the decision of the Wisconsin Supreme Court: (loc. cit. 269 Wis. 583-584, 70 N. W. 2d 194):

> "The conduct which the Wisconsin Employment Relations Board found to be a violation of sec. 111.06, Stats., as unfair labor practices, is virtually the same conduct as that which it had found to be a similar violation in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board* (1941), 237 Wis. 164, 295 N. W. 791. The present order and injunction are essentially the same as those issued by the board and the court in the *Allen-Bradley Case*. The principal attack on it then, like the attack on the present order, was made on the ground that federal labor legislation has preempted the field and the National Labor Relations Board has exclusive jurisdiction over this controversy, which grows out of and affects labor relations. The enforcement order issued by the circuit court in the *Allen-Bradley Case* in all substantial particulars is the same as the one issued by the circuit court in the case at bar. We sustained the circuit court and the board on such jurisdictional questions and on their exercise of the jurisdiction and we were affirmed by the supreme court of the United States in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board* (1942), 315 U. S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154."

The law under which the judgment was entered, the findings upon which it was entered, and the restrictions imposed by it, are the same as those involved in the *Allen-Bradley case, supra.*

The nature of the conduct and the restrictions imposed are described in the words of this court in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* (1942) 315 U. S. 740, 62 S. Ct. 820, 824, 86 L. ed. 1154:

> "We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson v. Buck,* supra. Rather, we must read the state Act for purposes of the present case as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. * * *
>
> "The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the comapny's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. * * *"

II.

THIS COURT HAS SEVERAL TIMES INDICATED THAT STATE JURISDICTION AS TO MATTERS INVOLVED IN THE ALLEN-BRADLEY CASE HAS NOT BEEN REMOVED BY LATER ACTS OF CONGRESS

The appellant rests its assertion that the state has no jurisdiction to enjoin mass picketing, threats of violence, property damage, obstructions of highways, and similar conduct, upon the fact that the Allen-Bradley case was

decided "long before the Taft-Hartley Act prohibited such conduct as union unfair labor practices."

This court has, however, in at least four cases decided since the enactment of the Taft-Hartley Act, recognized that jurisdiction over this type of conduct still rests with states. In *Garner v. Teamsters Union,* (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228, it was said:

> "* * * We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board,* 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. * * *"

This court said in *International Union, etc. v. O'Brien,* (1950) 339 U. S. 454, 459, 70 S. Ct. 781, 95 L. ed. 978:

> "* * * That activity we regarded as 'coercive,' similar * * * to the labor violence held to be subject to state police control in *Allen-Bradley Local v. Wisconsin Board,* 315 U. S. 740 (1942). * * *"

In *International Union v. Wisconsin E. R. Board,* (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, the following appears:

> "It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board. * * *"

In the latter case, decided under the provisions of the Taft-Hartley act, this court commented that policing of "actual or threatened violence to persons and property is left wholly to states," and that "no one questions the states' powers to police coercion accomplished by means of injury to property and threats to employees."*

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, the court said:

> "4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.
>
> "In Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 10 LRRM 520, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection."

In a more recent case, *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court again recognized the areas for state jurisdiction which were described in the excerpt from the *Garner case* by saying:

> "* * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. * * *"

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*loc. cit. 336 U. S. 253.

In support of its decision, the court quoted the following statement by Senator Taft, made before a Senate Committee when the Taft-Hartley Act was under consideration, indicating that it was intended that there might be both a state and federal remedy for certain types of coercive conduct such as threats of physical violence:

> "'But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? * * *'"

III.

IF THE STATE HAS JURISDICTION OF THE SUBJECT MATTER IT IS NOT LIMITED TO CRIMINAL PROCESS

The appellant suggests that the words of the *Garner case*, supra, recognizing the right of a state to exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways" would limit states to proceeding by criminal prosecution. The precise contention was rejected by this court in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 587, 93 L. ed. 691, where the court said:

> "* * * It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase

'(listed in section 8)'; the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'

"The term 'unfair labor practice' is not a term of art having an independent significance which transcends its statutory definition. The States are free (apart from pre-emption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.' * * *"

The reference in the more recently decided *Garner case* to "historic powers over such traditionally local matters" as public safety has no tendency to modify the decision of the *Algoma case*. The reference in the *Garner case* is to "powers" and "matters"; not to "remedies" and "procedures." If a state has the *power* to regulate a certain matter, there is no limit to the *methods* it may use, under its police power, to deal with that subject matter. Surely if regulation of conduct is sufficiently related to the public welfare to be within the power of the state to punish through criminal penalties, it would be an anomalous rule to say that the state may *punish* but not *prevent*. If conduct is contrary to the public welfare, surely it is preferable to prevent it wherever possible, than to wait for it to do its harm and then to punish.

This court has enumerated among proper areas for state regulation "threatened violence to persons or destruction of property."* Surely regulation of "threatened" action implies prevention.

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*loc. cit. 336 U. S. 253.

IV.

CONGRESS HAS PROVIDED NO METHOD FOR DEALING ADEQUATELY WITH SUCH LOCAL EMERGENCIES AS BREACHES OF THE PEACE AND TRAFFIC OBSTRUCTIONS. IT DID NOT INTEND THAT SUCH CONDUCT SHOULD BE, IN EFFECT, APPROVED BY WITHDRAWING IT FROM LOCAL REGULATION

In the case of *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court indicated that Congress intended that states should continue to have regulatory powers in matters with respect to which federal preventive administrative procedures are "impotent or inadequate," and with respect to conduct which the state "would have undoubted jurisdiction" to regulate if it had been followed by "unorganized private persons."

Those two conditions are met in this case. Not only does the National Labor Relations Board have no "express power"* to prevent the type of conduct here involved; but it has no *practical* means to do so, as is demonstrated by the record in this case. The appellant has pointed out that an unfair practice complaint was filed with the National Labor Relations Board on April 12, 1954, and that it has not yet been acted upon. It is impossible for a single agency to prevent depredations of the kind involved in this case, which may flare up without warning in a community a thousand miles away.

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*loc. cit. 346 U. S. 488.

Surely Congress did not intend that a community should suffer from highways obstructed by mass picketing, threats of physical injury and property damage, picketing of homes, and similar conduct, for periods of weeks, to say nothing of years.

Secondly, the type of conduct here prohibited would have been undoubtedly within state jurisdiction if engaged in by "unorganized private persons."

It has happened not infrequently that groups of people have banded together to picket theaters or public buildings because they disagreed with the views expressed by playwrights, actors, or speakers. Certainly those groups would not be permitted to prevent others from patronizing a lawfully conducted entertainment or meeting, by the kind of tactics involved in this case. It would be not only within the authority of the local government, but it would be its *duty*, to prevent such situations. Surely it was not intended by Congress to confer immunity upon a single segment of the population.

When the cry of "confusion" is raised in cases of this nature, it ordinarily comes from persons seeking to avoid regulation altogether. Surely no "confusion" can arise through prevention of unlawful conduct by the government agency best able to deal with it, when it is agreed by both federal and state governments that the conduct is inimical to public peace and contrary to our traditions of freedom.

Real confusion would arise if persons who are injured, or whose legal rights have been invaded, should appeal to their governmental officers for protection and learn that—

though both federal and state governments deplore the conduct—the wrongful acts are, for all practical purposes, protected because no agency has both the power and the means to deal with them.

Respectfully submitted,

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